repeated for ten years the need for review would seem to be sorely needed in order to determine whether due process of law is being denied by arbitrary, capricious, and unreasonable interference and from various organizations of union-affiliated teachers, men's clubs, women's clubs, church groups, possibly political parties, and so on all trying to seize power and interfere with the due process of law.

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STATE STATUTE CITED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1951.

No. 523

PEOPLE OF THE STATE OF ILLINOIS, ex rel. MARY S. M. LOUGHRY,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Respondent.

Statement by respondent of matters and grounds making against the jurisdiction of the Supreme Court of the United States.

MAY IT PLEASE THE COURT:

Respondent Board of Education of the City of Chicago, a body politic and corporate, respectfully presents to the Court the following matters and grounds making against the jurisdiction of the Supreme Court of the United States of the petition of Mary S. M. Loughry for a writ of certiorari to review the judgment of the Supreme Court of Illinois entered in the above entitled cause on September 12, 1951, denying petitioner leave to appeal from the judg-

ment of the Appellate Court of Illinois, First District, dismissing petitioner's cross-appeal and reversing and remanding the judgment in mandamus entered in said cause in the Circuit Court of Cook County.

Statement of the Case.

By Sec. 34-86 of the Illinois school law (Ch. 122, Sec. 34-86, Ill. Rev. Stats., 1949) the Board of Examiners (consisting of the Superintendent of schools and two persons appointed by the Board of Education upon the recommendation of the superintendent) is charged with the responsibility of giving all examinations for teachers' and principals' certificates in the public schools of Chicago. The same statute requires that all applicants taking such examinations shall be examined as to "character, scholarship and general fitness."

In December, 1947 and February and March, 1948, the Board of Examiners held a principal's examination [R. 5, (Ill. Sup. Ct. Abst. 5)] which petitioner took, together with 583 other candidates, but which she failed to pass (R. 10), the Board of Examiners having determined that she lacked the "general fitness" to entitle her to a principal's certificate.

Fifteen months after petitioner was notified that she failed in said examination, she sought a writ of mandamus to compel the defendant Board of Examiners to place her name on the list of eligibles for appointment as principal and to compel the Board of Education of the City of Chicage to issue to her a certificate of principal (R. 18), notwithstanding the fact that she failed to pass the examination.

An examination of the petition for mandamus discloses that petitioner does not allege facts to establish a right

to be certified as principal on the strength of her proven general fitness for a principal's certificate, but is based solely on her contention that the method of procedure used by the examiners for testing candidates was improper.

In an amendment to her petition for mandamus she prayed, in the alternative, that the Board of Examiners be commanded to expunge from its record her grade in the non-written examination and her final grade in the written and non-written examination as a whole and that the Examiners also be commanded to grant her a second oral examination, (R. 33). Defendants filed a motion to strike and dismiss the petition for mandamus. The Circuit Court of Cook County, Illinois, entered an order denying the defendants' motion to dismiss the action and entered an order finding that petitioner was not entitled to be placed on the eligible list of successful candidates or to receive a principal's certificate, and ordered that a peremptory writ of mandamus, directing the members of the Board of Examiners to expunge from its records the final grade and the non-written examination grade given to the petitioner in the examination, and to hold a new oral examination for petitioner which "should not inquire into or seek to evaluate or examine relator's poise or other personal factors" (R. 34). Thus the trial court directed that petitioner be given a second examination different from that given to the 583 other candidates who took the examination.

Defendants appealed, claiming that the trial court erred in overruling defendants' motion to strike (R. 35). Petitioner filed a cross-appeal, claiming she was entitled to the relief originally prayed for in her petition for mandamus (R. 35).

The Appellate Court of Illinois, First District, held that the petitioner's petition for mandamus failed to show a

clear legal right to the relief sought and therefore the defendants' motion to strike should have been sustained. The Appellate Court further held that petitioner's cross-appeal should be dismissed for the same reason. (*Peo. ex rel. Loughry* v. *Board of Education*, 342 Ill. App. 610.)

Leave to appeal was denied by the Supreme Court of Illinois by order entered September 12, 1951 (R. 69).

Respondent calls the court's attention to the fact that the petition for certiorari filed herein discloses that Hunt, Clarke and Edwards, as members of the Board of Examiners, have not been made respondents.

The Board of Education of the City of Chicago is a legal entity, separate and distinct from the members of the Board of Examiners and is without power in the conduct of examinations. Such power is vested by statute in the Board of Examiners. (*People ex rel. Cook* v. *Board of Education*, 295 Ill. App. 41.)

Thus it can be seen that any order which this court might enter would necessarily affect Hunt, Clarke and Edwards, as members of the Board of Examiners, and consequently, their omission from this proceeding is a fatal defect. (*Louisville & Nashville Railroad Co.* v. *Parker*, 287 U. S. 569, 77 L. ed. 501; *Boynton* v. *Hutchinson Gas Co.*, 292 U.S. 601, 78 L. ed. 1464.)

ARGUMENT.

I.

No Federal question was presented to or decided by the Illinois courts.

The record in the case at bar is wholly devoid of any showing that the petitioner raised or that the state courts considered or decided any federal question whatsoever, or that a decision on a federal question was necessary to the determination of the issues between the parties in this suit.

It has long been settled by this court that it acquires no jurisdiction to review the judgment of a state court unless it affirmatively appears on the face of the record that a federal question, constituting an appropriate ground for such review, was presented in the state court and expressly or necessarily decided by such state court (*Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U.S. 206, 212, 213, 82 L. ed. 751, 755; *Lynch* v. *New York,* 293 U.S. 52, 54, 79 L. ed. 191, 192; *Mellon* v. *O'Neil,* 275 U.S. 212, 214, 72 L. ed. 245, 246; *Whitney* v. *California,* 274 U.S. 357, 360, 361, 71 L. ed. 1095, 1099, 1100; *Johnson* v. *Risk,* 137 U.S. 300, 306, 307, 34 L. ed. 683, 686; *DeSaussure* v. *Gaillard,* 127 U.S. 216, 234, 32 L. ed. 125, 132.)

In *Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U.S. 206, 82 L. ed. 751, this court in applying the rule, stated at pp. 212-213:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the

State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

An examination of the entire record will disclose that nowhere, either in the pleadings or in the decisions of any of the Illinois courts before which this case was heard, was there any issue made or decided on a federal question with reference to the Constitution of the United States. As a matter of fact, nowhere in the record is there any reference to the Constitution of the United States.

The sole basis upon which petitioner now attempts to establish that a federal question was presented to and decided by the state courts is the quotations set forth at page 2 of her petition for certiorari from paragraph 36 of her original petition for mandamus and from page 23 of her brief filed in the Supreme Court of Illinois. Neither of these shows or establishes the fact that a federal question was raised or decided by the state courts.

Even if such quotation from the brief did raise a constitutional question, which it does not, respondent points out that such brief forms no part of the record and thus it is not adequate to create a federal question. This is made clear in the case of *Live Oak Water Users' Asso.* v. *Railroad Commission,* 296 U.S. 354, 358; 70 L. ed. 305, 309, where the Court in quoting from *Zadig* v. *Baldwin,* 166 U.S. 485 said:

"In *Zadig* v. *Baldwin,* 166 U.S. 485, 488. 41 L. ed. 1087, 1088, 17 Sup. Ct. Rep. 639, here upon error to the supreme court of California, this court said: 'The contention that there was a Federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this court, what purports to be an extract from the closing brief of counsel presented to the supreme court of the state,

> in which such a Federal question is discussed, and it is asserted orally at bar that in the oral argument made in the supreme court of California a claim under the Federal Constitution was presented. But, manifestly, the matters referred to form no part of the record and are not adequate to create a Federal question when no such question was necessarily decided below, and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the state.' "

It is true that in paragraph 36 of her petition petitioner alleged in general terms that "in violation of her constitutional rights" she was deprived of a place on the list of eligibles for appointment as a principal in the Chicago Public School System. However, there is no reference to or mention of the United States Constitution in the record. No right, privilege or immunity is specifically set up for claimed under the Federal Constitution. The only reference made by her to any specific constitutional provisions were those of the Illinois State Constitution (Rec. 2, 16, 17) It has been pointed out by this Court in many cases that when the jurisdiction of this court is invoked for the protection against the final judgment of the highest court of a state of some title, right, privilege or immunity secured by the constitution or laws of the United States, it must appear expressly or by necessary intendment from the record that such right, title, privilege or immunity was specially set up or claimed under the Federal Constitution or laws. In so holding this court in *Kipley* v. *State of Illinois ex rel. Akin,* 170 U.S. 182, 186, 187, 42 L. ed. 998, 1001 said:

> "We are of the opinion that this court is without jurisdiction to review the final judgment of the supreme court of Illinois in these cases. The answer makes no reference whatever to the Constitution or laws of the United States. It is true that it avers that the Illinois civil service act was 'unconstitutional

and void.' But when the jurisdiction of the court is invoked for the protection, against the final judgment of the highest court of a state, of some title, right, privilege, or immunity secured by the Constitution or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege, or immunity was 'specially set up or claimed' under such Constitution or laws. Rev. Stat. 709. Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a Federal right. *F. G. Oxley Stave Co.* v. *Butler County*, 166 U.S. 648 (41:1149); *Levy* v. *San Francisco*, Superior Court, 167 U.S. 175, 177 (42:126)."

Of like import was the decision of this court in the case of *Farney* v. *Towle*, 66 U.S. 350, 351, 17 L. ed. 216, 217 where the court said:

"And the plaintiff in error alleges that this law was a violation of that article of the Constitution of the United States which declares that 'no State shall pass any law impairing the obligation of contracts.'

"But no such point appears to have been raised in the state court, and this article in the Constitution does not appear to have been even referred to or noticed in any part of the proceedings. The answer of the plaintiff in error, it is true, charges, in general terms, that the law was unconstitutional and void; but from the context it would seem that this charge was applied to the constitution of the State rather than to that of the United States; and even if it could be construed as applying to the latter, it has repeatedly been declared by this court, as will appear by the reports of its decisions, that in order to give it jurisdiction, it must appear that the point was raised and decided in the state court; that the attention of the court was called to the particular clause of the Constitution of the United States upon which the party relied, and to the right he claimed under it; and that, with the question thus distinctly presented, the decision was against him."

Petitioner asserts at page 3 of her petition for certiorari that she "contended in the courts of the State of Illinois that she has been deprived of her rights to due process under the Fourteenth Amendment to the Constitution of the United States," but makes no reference to any part of the record which would support or show that she made such claim in the state courts. Equally unsupported by the record is her statement on page 16 of her petition "that court (the Appellate Court), in reversing the decision of the trial court, had held that the methods and procedures employed by the Chicago Board of Education for the examination of applicants for certificate as principal were not violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States." There is absolutely no basis for such statement and a reading of the Appellate Court's opinion will clearly show that its decision was not in any way based upon a federal question, but was based purely upon local law, as we will more particularly show in Point II hereof.

An examination of the petition for leave to appeal filed in the Supreme Court of Illinois clearly discloses that the sole basis upon which leave to appeal was sought was on the assertion (1) that the Appellate Court erred in holding that the petition failed to show a clear legal right to a writ of mandamus, and (2) that it erred in dismissing plaintiff's cross-appeal. Nowhere is it there stated, or suggested that a federal question was involved or that the petitioner was "deprived of her rights to due process under the Fourteenth Amendment to the Constitution of the United States," as she now contends. The first time in this case that a federal constitutional question has been asserted is in the petitioner's present petition for writ of certiorari. Such question being raised now for the first time comes too late, as was pointed out in *Wabash*

Railroad Co. v. *Flannigan,* 192 U.S. 29, 37, 48 L. ed. 328, 331, where the court at page 37 said:

> "The constitutional questions now urged on behalf of plaintiff in error are that the dismissal of its petition for interpleader was a denial of full faith and credit to the garnishment judgment rendered by the Illinois court, and that the denial of the relief prayed for also violated the due process clause of the 14th Amendment to the Constitution of the United States.
>
> "The objection, last stated, need not be further noticed, as it was asserted for the first time in the petition for the allowance of a writ of error from this court."

To the same effect is *Mallers* v. *Commercial Loan & Trust Co.,* 216 U.S. 613, 614, 54 L. ed. 638.

II.

The Supreme Court and Appellate Court of Illinois determined this case upon non-Federal grounds adequate to sustain the judgment. The issues determined were purely matters of local law. Under such circumstances this court has no jurisdiction to review.

The only issues raised by petitioner's pleadings in her original suit and presented by the record and ultimately determined by the Appellate and Supreme Courts of Illinois were—did the Board of Examiners in conducting the examination of petitioner for certificate of principal in the Chicago public schools abuse its discretion in providing for and conducting the oral part of said examination; was the examination conducted in conformance with the state statute; and was the petitioner entitled to a principal's certificate notwithstanding her failure to pass the examination?

The Appellate Court states the issues presented by the record thus (*People ex rel. Loughry* v. *Board of Education,* 342 Ill. App. 610, 615):

> "No contention is made by plaintiff that there was any fraud, collusion, or discrimination in the oral examination given to plaintiff by defendants, nor does she question the honesty and good faith of defendants or the members of the oral examining committee who interviewed her. All of the allegations of the petition relate to the propriety of the method of procedure adopted by the Board of Examiners for testing candidates in the oral examination."

The Appellate Court examined the provisions of the state statute and found that the Board of Examiners was vested with authority to establish rules and regulations for the purpose of testing all candidates as to character, scholarship and general fitness, stating at page 614:

> "The pertinent provision in the school law relating to the Board of Examiners is found in Illinois Revised Statutes 1949, State Bar Association Edition, Chapter 122, section 34-86 (Jones Ill. Stats. Ann. 123.1447), which provides in substance that the Board of Examiners, consisting of the Superintendent of Schools and two persons, approved and appointed by the Board of Education upon the nomination of the Superintendent, shall examine all applicants required to hold certificates to teach, and that the Board of Education shall issue such certificates to those who pass the required tests of character, scholarship, and general fitness. In construing the foregoing provision this court held in *People ex rel. Cook* v. *Board of Education,* 295 Ill. App. 41, that the Board of Examiners is vested with authority to establish rules and regulations for the purpose of testing all candidates as to character, scholarship, and general fitness."

In holding that the Board of Examiners had conducted a proper examination pursuant to its statutory authority, and that the court would not substitute its judgment for

that of examiners who under the statute were given the authority and responsibility to make such determinations, the court said at page 617:

> "It may well be that more scientific methods of giving oral tests than those used in the instant case by the Board of Examiners can be employed but, however meritorious another method may be, that we think does not present a question of law.
>
> "Our Supreme Court has repeatedly held that in discretionary matters the court will not substitute its judgment for that of an administrative body. (*Smith* v. *Board of Education,* 405 Ill. 143; *People ex rel. Illinois Highway Transp. Co.* v. *Biggs,* 402 Ill. 401.)"

The Appellate Court in its opinion then proceeds to dispose of each of the contentions of petitioner and shows there is no merit to any of them and concludes by saying at p. 620:

> "The rule is well established that the writ of mandamus will issue only when a clear and undeniable right is shown to exist (*Coughlin* v. *Chicago Park Dist.,* 364 Ill. 90). In the case at bar the allegations of the complaint fail to show a clear right to the writ of mandamus and therefore defendants' motion to strike the complaint as amended should have been sustained."

It is manifest that no federal question was passed on by the Appellate Court of Illinois. Its decision was put upon an independent non federal ground involving no federal question and of itself sufficient to support the judgment. It merely determined that the Board of Examiners had authority under the statute to pass rules and regulations in connection with examinations for persons seeking positions of principals; that the Board of Examiners did not abuse their discretion in the conduct of said examination; that the examination was conducted in conformance with the statute and that petitioner was not entitled to a

writ of mandamus compelling the defendants to issue a principal's certificate to her.

When the decision below is founded upon a state or local question a petition for certiorari will be dismissed. *Bell Telephone Co. of Penn.* v. *Van Dyke,* 296 U.S. 533, 80 L. ed. 379; *Preston* v. *Chicago,* 226 U.S. 447, 450, 57 L. ed. 293, 295; *White* v. *Leovy,* 174 U.S. 91, 95, 43 L. ed. 907, 909; *Kipley* v. *State of Illinois ex rel Akin,* 170 U.S. 182, 42 L. ed. 998, 1002; *Chicago & N. W. R. Co.* v. *Chicago,* 164 U.S. 454, 457, 41 L. ed. 511, 512; *Remington Paper Co.* v. *Watson,* 173 U.S. 443, 43 L. ed. 762; *Wilson* v. *State of North Carolina,* 169 U.S. 586, 592, 42 L. ed. 865, 870.

It has long been established by the decisions of this Court, commencing at least as early as the case of *Klinger* v. *Missouri,* 80 U.S. 257, 263, 13 Wall. 257, 263, 20 L. ed. 635, 637, that even where the state court judgment rests upon two grounds one of which is federal and the other non-federal in character, this Court will not take jurisdiction of the case if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Arkansas Southern Railroad Co.* v. *German National Bank,* 207 U.S. 270, 275, 276, 52 L. ed. 201; *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.,* 243 U.S. 157, 164, 165, 61 L. ed. 644, 649; *Municipal Securities Corp.* v. *Kansas City,* 246 U.S. 63, 62 L. ed. 579; *Petrie* v. *Nampa and M. Irrig. Dist.,* 248 U.S. 154, 157, 63 L. ed. 178; *McCoy* v. *Shaw,* 277 U.S. 302, 303, 72 L. ed. 891,892; *Fox Film Corp.* v. *Muller,* 296 U.S. 207, 210, 80 L. ed. 158, 159.

Conclusion.

For the reasons herein set forth, respondent respectfully submits that the Supreme Court of the United States should decline to take jurisdiction and should deny the petition for certiorari.

Respectfully submitted,

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FILED
FEB 29
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1951

No. 523

PEOPLE OF THE STATE OF ILLINOIS EX REL MARY S. M. LOUGHRY,

Petitioner,

vs.

BOARD OF EDUCATION OF CITY OF CHICAGO,

Respondent

BRIEF IN OPPOSITION TO STATEMENT OF RESPONDENT MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

MARY S. M. LOUGHRY,
Petitioner,
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Chicago 10, Illinois.

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